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December 17, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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VIA MESSENGER

Hon. William E. Kennard
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Application by New York Telephone Company for Authorization to Provide In-Region, InterLATA Services in New York; CC Docket No. 99-295*

Dear Chairman Kennard:

The Association for Local Telecommunications Services ("ALTS"), by its attorneys, submits these *ex parte* comments, in response to the Commission's December 10, 1999 Public Notice (DA 99-2779) in the captioned proceeding, regarding Bell Atlantic's commitment to establish a so-called "separate subsidiary" for the provision of advanced services.

ALTS believes that, while procompetitive in theory, the Bell Atlantic approach is a flawed and legally deficient basis for long-distance authorization under section 271 of the Communications Act. If the Commission chooses to adopt the Bell Atlantic model, it can and must do so only by means of *conditional approval* of the Bell Atlantic application. In this way, Bell Atlantic's interLATA authority would become effective on July 1, 2000, upon complete and successful implementation of separate subsidiary safeguards that meet not only the conditions of the SBC/Ameritech Order, but also the more strict structural separation requirements of section 272 of the Act.

SUMMARY

Bell Atlantic's last-minute separate subsidiary proposal is clearly too little, too late to meet its section 271 legal obligations. Bell Atlantic's proposal does not rectify its thoroughly documented inability to meet the interconnection and loop unbundling requirements of the Act and the Commission's implementing rules, not only for xDSL loops, but for all other types of loops as well. As such, the proposal represents an egregious misapplication of the Commission's SBC/Ameritech Order. The Commission made clear in approving the

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SBC/Ameritech merger that “the structure of the separate advanced services affiliate that is required under the conditions would not be adequate for SBC/Ameritech’s provision of in-region, interLATA services following section 271 authorization.” SBC/Ameritech Order ¶ 357. More importantly, the Bell Atlantic proposal does nothing to ameliorate its past failures to meet the “competitive checklist,” but instead offers only the possibility that its *future* treatment of CLECs may conform to the network opening and nondiscrimination requirements of the Act.

As the Commission has consistently and unequivocally held, a mere promise of future compliance is insufficient to meet an incumbent LEC’s burden under section 271.¹ Moreover, while a truly separate affiliate could mitigate the anticompetitive incentives that have undermined local competition in New York, the SBC/Ameritech affiliate structure is far from separate. Nor does it provide equality of treatment to xDSL and other CLEC competitors. For instance, the Bell Atlantic proposal does not provide for provisioning parity either for stand-alone unbundled loops or for “line sharing” UNEs, and has no “anti-backsliding” terms to ensure that Bell Atlantic’s real-world performance in the delivery of key monopoly network elements is not degraded following section 271 authorization. *See* ALTS Oct. 19, 1999 Comments at 79-86 (“ALTS Comments”). Section 271 plainly requires *present* compliance with the competitive checklist. By offering a separate affiliate proposal that it admits “*will* provide a structural mechanism to ensure that competing providers of advanced services receive effective, nondiscriminatory access to the facilities and services . . . that are necessary to provide advanced services,”² Bell Atlantic is speaking out of both sides of its mouth. An incumbent LEC simply cannot demonstrate current satisfaction of section 271 through a separate affiliate that is just now being proposed, and will not be in place for many months at best.

ALTS is not opposed to the use of structural separation as a means of safeguarding nondiscrimination in implementing the Act. To the contrary, ALTS believes that a properly structured affiliate separation requirement can achieve the procompetitive objectives set forth in the SBC/Ameritech Order. The problem with Bell Atlantic’s approach is that the SBC/Ameritech Order was not designed and cannot serve — at least without substantial modification — as a model for section 271 interLATA analysis. Accordingly, ALTS pro-

¹ A BOC must demonstrate it “is providing” each of the items enumerated in the 14-point competitive checklist codified in section 271(c)(2)(B). *Application of Ameritech Michigan Pursuant to Section 271*, Memorandum Opinion & Order, CC Docket No. 97-37, FCC 97-298, ¶ 14 (rel. Aug. 9, 1997); *Application of BellSouth Corporation for Provision of In-Region, InterLATA Services*, Memorandum Opinion & Order, CC Docket No. 98-121, FCC 98-7, ¶ 23 (rel. Oct. 13, 1998).

² Letter from Thomas J. Tauke, Bell Atlantic, to William E. Kennard, at 1 (Dec. 10, 1999)(“Bell Atlantic Letter”)(emphasis supplied).

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poses that, if the Commission adopts the Bell Atlantic proposal, it should do so only under the following terms:

1. Bell Atlantic's interLATA application should be *conditionally approved* subject to compliance, not later than July 1, 2000, with the structural separation conditions.
2. The conditions of the SBC/Ameritech Order, as applied to Bell Atlantic, should be augmented to expand beyond xDSL elements and include (a) loop provisioning intervals and performance metrics, (b) the availability of line sharing to xDSL competitors no later than required by the Commission's Line Sharing Order,³ (c) provisioning intervals and performance metrics for high-capacity trunks, including interconnection trunks, and "hot cuts," and (d) anti-backsliding conditions, as previously described by ALTS.
3. The structural separation requirements for the Bell Atlantic advanced services affiliate should be strengthened to comply fully with the separation mandate of section 272 of the Act. See SBC/Ameritech Order ¶ 357 n.665.
4. Bell Atlantic's certification of compliance with the conditional approval, and formal Commission concurrence therewith after notice and public comment, should be an express predicate to the provision of interLATA services; and
5. The conditional authority should be suspended automatically, pursuant to section 271(d)(6)(A), if the Commission is unable to find that Bell Atlantic has completely and successfully implemented all of the separate subsidiary safeguards.

As we have emphasized, ALTS does not represent any of the major IXC's, and therefore its interest in this proceeding "is singularly focused on ensuring that the New York local telephone market is open to competition." ALTS Comments at i. With the approach outlined above, ALTS hopes and expects that, if it adopts the Bell Atlantic model, the Commission

³ Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Third Report and Order (rel. Dec. 9, 1999)("Line Sharing Order").

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will do so in a manner consistent with the statutory scheme and with adequate assurances that the pro-competitive purposes of structural separation will actually be achieved prior to the provision by Bell Atlantic of in-region, interLATA telecommunications services.

DISCUSSION

There are three basic flaws in Bell Atlantic's proposal for the establishment of a structurally separate advanced services affiliate in the context of its pending application for in-region, interLATA authority in New York under section 271 of the Act. First, Bell Atlantic has not met the "competitive checklist" for several key components of local exchange competition. Second, by proposing to adopt the SBC/Ameritech Order conditions, Bell Atlantic improperly asks the Commission to accept those merger conditions as proof of section 271 compliance. Third, the SBC/Ameritech Order conditions do not establish a truly "separate" affiliate and are plainly inadequate to meet an incumbent LEC's separation obligations under section 272.

1. Competitive Checklist Failure. The record in this proceeding overwhelmingly demonstrates that, despite its public pronouncements and significant improvements in the past year, Bell Atlantic's New York LEC subsidiary has still not fulfilled its section 251 interconnection, unbundling and collocation obligations. These market opening and nondiscrimination obligations are incorporated into the competitive checklist of section 271(c)(2)(B), and are thus a predicate to approval of Bell Atlantic's interLATA application. Without reiterating the massive record evidence on this point, several key points stand out. As ALTS has explained, among other things, (a) Bell Atlantic's collocation tariffs and practices do not comply with the Commission's March 1999 Collocation Order (*see* ALTS Comments at 49-64), (b) Bell Atlantic's "hot cut" procedure and loop provisioning practices are inadequate to provide unbundled loops to CLECs (*see id.* at 27-32), (c) Bell Atlantic's xDSL loop provisioning imposes impermissible technical constraints and non cost-based conditioning charges on competing data CLECs (*see id.* at 33-38), (d) Bell Atlantic has been extremely tardy in provisioning unbundled dedicated transport and interconnection trunks, *e.g.*, high capacity DS-3 and T1 circuits (*see* ALTS Comments at 40-45; ALTS Nov. 8, 1999 Reply Comments at 7-12; DOJ Evaluation at 10 n.20),⁴ and (e) Bell Atlantic's "Performance Assurance Plan" falls short of providing true assurances that Bell Atlantic will maintain a competitive local market, once that point is truly reached (*see* ALTS Comments at 76-79).

⁴ In fact, Bell Atlantic appears to argue, incorrectly, that dedicated and special access interconnection are not part of its section 271 obligations. *See* Letter from ALTS, *et al.* to William Kennard, CC Docket No. 99-295 (Dec. 1, 1999)("Dedicated Transport Ex Parte").

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These are all “discrete, but competitively significant deficiencies.” ALTS Reply Comments at 2. As a matter of policy, they represent some of the most important and basic elements required to establish the vigorously competitive local exchange market in New York envisioned by the 1996 Act. As a legal matter, because Bell Atlantic has not yet satisfied the statutory conditions to interLATA authorization on a number of fronts that are not limited to DSL competition, its proposed separate advanced services affiliate cannot serve as a panacea for these myriad problems and is irrelevant to the Commission’s section 271 analysis and decision.

2. Improper Extension of the SBC/Ameritech Order. Bell Atlantic is correct that a properly designed separate subsidiary structure can provide incentives for the equal and nondiscriminatory treatment of incumbent LEC competitors in access to key monopoly network elements. But Bell Atlantic’s current proposal, as a form of section 271 proof, is misguided. A separate affiliate structure is a forward-looking safeguard; it establishes corporate “arms-length” transactional requirements that, over time, can mitigate the rational business incentives of monopoly providers to favor their own services over those offered by rivals. Consequently, by its very nature a separate affiliate “condition” cannot be adequate to ameliorate the *present* failure of Bell Atlantic to meet its section 271 market opening obligations. “Promises of future performance are entirely irrelevant” to section 271. ALTS Reply Comments at 23. Indeed, the Commission’s “insistence on actual performance — and not future promises — of incumbent LEC compliance with our rules is not new.” UNE Remand Order 271 n.541.

Reliance on the specific separation conditions of the SBC/Ameritech Order is equally improper. The SBC/Ameritech proceeding raised the issue of whether the merger would, in the future, diminish competition in local telephony and advanced services. Because that sort of an antitrust prediction is markedly different from the backward-looking standard of section 271, the SBC/Ameritech Order cannot serve as a precedent for interLATA relief. The Commission could not have made this clearer. As the SBC/Ameritech Order stressed, the conditions adopted there “are designed to address potential public interest harms specific to the merger of the Applicants, not the general obligations of incumbent LECs or the criteria for BOC entry into the interLATA services market.” SBC/Ameritech Order ¶ 357. Thus, the Commission was not issuing “an interpretation of sections of the Communications Act, especially sections 251, 252, 271 and 272, or the Commission’s rules,” and the SBC/Ameritech model “would not be adequate for [the] provision of in-region, interLATA services following section 271 authorization.” *Id.* These assurances were added by the Commission at the express urging of competitive DSL providers, who were concerned that the conditions reflected in the SBC/Ameritech proposal might “lower the bar” for compliance with section 251, and of

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voice CLECs, who argued that the proposal “prejudged” the nondominant status of incumbent LEC affiliates. Consequently, it would be improper and unfair for the Commission, in this section 271 proceeding, to accord the very precedential status to the SBC/Ameritech conditions that it expressly rejected in the SBC/Ameritech Order.

3. Lack of True Affiliate Separation. The separation proposals advanced by Bell Atlantic are inadequate to provide reliable assurance that the interconnection, unbundling and collocation deficiencies experienced to date in New York will be remedied in the future. Unlike the rigorous corporate separation and transactional requirements of section 272(b), or the wholesale/retail structures adopted by some other incumbent LECs, the modified SBC/Ameritech conditions offered by Bell Atlantic do not provide either true separation of its advanced services affiliate or parity of treatment for CLEC competitors.

- Bell Atlantic proposes to adopt only a small portion of the SBC/Ameritech affiliate structure. For instance, Bell Atlantic has not agreed to the advanced services OSS (¶¶ 15-18, 25-34), loop information (¶¶ 19-20), loop conditioning charges (¶¶ 21) and collocation compliance (¶¶ 37-41) provisions of the SBC/Ameritech conditions.
- Bell Atlantic’s application of the SBC/Ameritech conditions includes substantial sharing of marketing and OSS interfaces (¶ 3(a)), existing advanced services equipment (3(d)) and office facilities, including commingling of employees (¶ 3(g)).
- Although the Commission has released its Line Sharing Order since the date of the SBC/Ameritech Order, Bell Atlantic nonetheless proposes only to begin a line sharing “trial” by December 20, 1999 and to provide so-called “interim line sharing” until July 1, 2000 (Bell Atlantic Letter, Attachment A, ¶ 13). In contrast, the Commission now requires all incumbent LECs, subject to state-supervised arbitrations (if necessary), to provide line sharing no later than June 2, 2000. Line Sharing Order ¶¶ 130, 161-177 (180 days after release of the Order).
- Most significantly, the SBC/Ameritech Order conditions do not provide any assurance that the key competitive deficiencies shown in New York regarding interconnection, unbundling and collocation will be rectified in the future. The conditions do not include any parity obligation, performance metrics or commercially meaningful enforcement procedures and

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penalties for the basic checklist provisioning activities, which lie at the heart of Bell Atlantic's failure of checklist compliance. Unless and until the separation conditions are revised to reflect the competitive need to the timely and accurate provisioning of these key UNEs, the Bell Atlantic separate affiliate proposal will do nothing to create a truly "separate" advanced services subsidiary that competes on a level playing field with its voice and data CLEC competitors.

These deviations from true structural separation directly conflict with the assertion by Bell Atlantic that its proposal will assure parity of treatment between the incumbent LEC's advanced services affiliate and data CLEC competitors. Moreover, at the very least, by embracing a six-month "transition period" for implementation of the affiliate separation requirement, Bell Atlantic's proposal assures that, during the crucial period of xDSL service roll-out and customer acquisition, data CLEC competitors will *not* be treated the same as Bell Atlantic's advanced services affiliate.

PROPOSAL

For all the foregoing reasons, ALTS believes that, on this record, Commission approval of Bell Atlantic's section 271 application is impermissible. If the Commission is inclined to adopt the Bell Atlantic structural separation proposal in its forthcoming order on interLATA authority, however, ALTS proposes that the Commission do so in the form of a *conditional* authorization. Simply put, if Bell Atlantic's commitment to establish a separate advanced services affiliate is to be given weight by the Commission in its section 271 decision, any Commission authorization for the provision of in-region, interLATA services by Bell Atlantic in New York should be effective only *after* Bell Atlantic has fully complied with the separation conditions proposed in the Bell Atlantic Letter. Furthermore, the Commission should condition the effectiveness of its interLATA authorization on specific additions to the separation requirements — including compliance with the full separation requirements of section 272 — as well as penalty provisions resulting in the suspension or revocation of conditional interLATA authorization if Bell Atlantic is not in full compliance with the conditions by the July 1, 2000 end of the "transition period."

The SBC/Ameritech Order conditions should be augmented to include (a) loop provisioning intervals and performance metrics, (b) the availability of line sharing to xDSL competitors no later than required by the Commission's Line Sharing Order, (c) provisioning intervals and performance metrics for high-capacity circuits, interconnection trunks and "hot cuts," and (d) anti-backsliding conditions. These measures have previously been addressed in

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detail by ALTS (ALTS Comments at 79-88; ALTS Reply Comments at 22-27; Dedicated Transport Ex Parte at 2-3) and many other parties. In light of the substantial record evidence detailing Bell Atlantic's failure to provide unbundled loops and dedicated transport to its voice and data CLEC competitors, such additional conditions are the minimum necessary to transform the SBC/Ameritech Order conditions into a useful tool for increasing the likelihood of future compliance by Bell Atlantic with its checklist obligations. Indeed, as the Commission stated in that Order, the SBC/Ameritech conditions are "not meant to substitute for any enforcement mechanisms that the Commission may adopt in the section 271 context (*i.e.*, anti-backsliding measures)." SBC/Ameritech Order ¶ 357. These enforcement measures are a key protection that must be added to the Bell Atlantic proposal in order to provide any realistic assurance of future checklist compliance by Bell Atlantic in New York.

The proposed conditions should also be augmented to provide for full section 272 structural separation. As the SBC/Ameritech Order makes clear, a BOC "must *comply fully with all section 272 requirements* to provide in-region, interLATA services." *Id.* (emphasis supplied). Because the Bell Atlantic advanced services separate affiliate will be providing services that this Commission has already classified as jurisdictionally interstate (and hence interLATA), the provisions of section 272(a)(2)(B) clearly apply.⁵ In sharp contrast, the SBC/Ameritech conditions, like the Bell Atlantic proposal, adopt just a portion of section 272, specifically including only the requirements of sections 272(b), (c), (e) and (g). SBC/Ameritech Order, Appendix C, ¶ 3. Having already concluded that a section 271 application assumes full compliance with section 272, the Commission has no legal or policy justification for accepting the lesser form of separation argued for by Bell Atlantic.

Lastly, as to timing, ALTS proposes that because Bell Atlantic's advanced services affiliate will not be fully phased-in until July 1, 2000, the Commission provide a conditional authorization that will become effective on that date, subject to Bell Atlantic's compliance with the modified conditions approved by the Commission. This is an appropriate date for the commencement of interLATA services because it is the date on which Bell Atlantic says it will have completed implementation of its "transition period," and because the Line Sharing Order's 180-day time period for the provision of line sharing for data CLECs will have gone into effect. Accordingly, ALTS suggests that Bell Atlantic's certification of compliance with

⁵ Even if the separate affiliate were not offering jurisdictionally interstate services, Bell Atlantic's proposal is still made in the context of its section 271 application for in-region, interLATA authorization. Section 271(d)(3)(B) requires the Commission to find that "the requested authorization will be carried out in accordance with the requirements of section 272." Consequently, as Bell Atlantic's interLATA application includes a request for establishment of an advanced services subsidiary, for section 271 purposes that affiliate is required to comply with the section 272 criteria even though affiliates established for other purposes, such as a merger, may not need to comport with section 272.

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the conditional approval, and formal Commission concurrence therewith after notice and public comment, should be an express predicate to the provision of interLATA services. We also believe, as discussed previously (ALTS Comments at 79-85), that this conditional authority should be suspended automatically, pursuant to section 271(d)(6)(A), if the Commission is unable to find that Bell Atlantic has completely and successfully implemented all of the separate subsidiary safeguards.

CONCLUSION

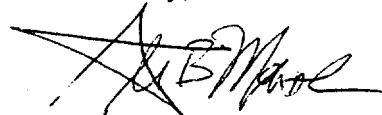
Bell Atlantic's last-minute proposal for an advanced services separate affiliate is too little and too late to be given any legitimate weight in the Commission's section 271 decision on in-region, interLATA services authority in New York. Bell Atlantic has failed to demonstrate its compliance with the statutory competitive checklist in several discrete but competitively essential areas of interconnection, unbundling and collocation; its separate subsidiary proposal will do nothing to rectify the problems associated with loop provisioning, collocation, dedicated transport, hot cuts, and loop qualification information access. The SBC/Ameritech Order, by its own terms, is an insufficient policy and legal basis for section 271 approval.

ALTS nonetheless agrees that a properly designed separate subsidiary structure can provide incentives for the equal and nondiscriminatory treatment of incumbent LEC competitors in access to key monopoly network elements. Although we disagree with the assumptions in the Bell Atlantic proposal, if the Commission is inclined to accept a separate affiliate structure as part of its section 271 decision, ALTS urges the Commission to provide a *conditional approval* for Bell Atlantic in-region interLATA entry that would become effective no earlier than July 1, 2000, subject to certified and Commission-endorsed compliance by Bell Atlantic with the proposed separation requirements. The Commission should also augment the Bell Atlantic separation proposal, as discussed in these and ALTS' earlier

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comments, to include specific protections against discrimination and anticompetitive behavior in loop provisioning, including substantial performance standards and penalties.

Sincerely,

A handwritten signature in black ink, appearing to read "G. B. Manishin", with a large, stylized "X" or "A" shape written over the first part of the signature.

Glenn B. Manishin

*Counsel for the Association for
Local Telecommunications Services*

gbm:hs

cc: Magalie Roman-Salas, Secretary
Commissioner Harold Furchgott-Roth
Commissioner Susan Ness
Commissioner Michael Powell
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